United States Court of Appeals

for the Second Circuit

BRIEF FOR APPELLEE

74-1261

ORIGINAL

To be argued by
HARRY R. SCHWARTZ

United States Court of Appeals

For the Second Circuit

SAMUEL TITO WILLIAMS,

Plaintiff-Appellee,

against

THE CITY OF NEW YORK,

Defendant-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF OF PLAINTIFF-APPELLEE

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Preliminary Statement

The defendant, City of New York, is appealing from a judgment entered in the office of the Clerk of the United States District Court, for the Southern District of New York, on the 30th day of January, 1973 in favor of the plaintiff in the amount of $40,000.00 compensatory damages and $80,000.00 punitive damages and from an order entered on November 14, 1973 denying defendant's post-trial motion for a judgment n.o.v.

The notice of appeal from said order and judgment was dated November 14, 1973 (3-5).

Issues

1. Was the jury and the Trial Court correct in holding that the defendant lacked probable cause and acted maliciously as a result of its unexplained arrest of the plaintiff four months after the murder, its protracted interrogation, physical torture and threats against the life of the plaintiff herein and in disregarding the statement of the only eye witness that the murderer was white, with the plaintiff herein being a black man?

The Trial Court below answered this question in the affirmative and refused to set aside the jury's verdict.

2. Did the jury properly find that punitive damages were warranted against the defendant herein, who made no request to charge with respect to punitive damages and took no exception to the Court's charging said damages?

The Trial Court answered this question in the affirmative stating that:

> "While punitive damages are only permitted against public bodies in extreme cases, the facts which the jury must have found in order to return a judgment for plaintiff are clearly extreme".

Counter-Statement of Facts

The brief of the appellant omits and overlooks certain essential testimony, evidence and facts necessitating this counter-statement, and erroneously includes references to judicial opinions and records which were not before the jury.* The trial court in his opinion further criticized

* With respect to the defendant, the trial court indicated that "In fact, the arguments presented in the City's affidavit in support of the motion rely not upon the Record of this trial, but upon the entire history of civil and criminal litigation affecting Mr. Williams". Defendant attempts to do the same in the within appeal.

defendant stating that "The jury . . . were aware of nothing beyond the testimony read to them by counsel, which were, in accord with my ruling, the only matters in the prior proceedings properly before the jury in the instant case".

Plaintiff's Proof

Samuel Tito Williams, the plaintiff herein, was 18 years old in September of 1947. He had just come out of the Navy, received an honorable discharge and a disability pension for a rheumatic heart disease. He had been working as a stock clerk for about 3 months but had stopped working upon the advice of his doctor (30).

On September 8, 1947 at approximately 2 A.M. in the morning he was coming out of a park, walking toward the local theatre on Pitkin Avenue towards his home. ". . . Someone called out and ran up behind me and they grabbed me and they turned me around and started searching me, started searching me under my arms and my legs down to my shoes and I asked them what was the matter, you know, why are you searching me. He told me to shut my 'damn mouth' so they told me to get in the car and I got in the car" (30-31). It is uncontradicted that he was picked up for no apparent reason.

They took him to his home, searched his house, put his clothes in a box and took him to the police station; they handcuffed him to a radiator, asking him ". . . all sorts of questions and started knocking me in the head and beat me". They asked him about burglaries and robberies and brought people to look at him. "They looked at me and said 'not him' and walked on and that made them all the madder and they just beat me more" (31).

Over a period of 38 hours they beat him on his head, arms and legs and hit him with a rubber hose ". . . my

legs were swollen up like a peach ready to pop''. They also took him out to places for people to identify him but everybody told them that they never saw him. When they got back to the precinct they cursed him and called him ''Nigger'' (32).

When they started asking him questions and he said ''no'' they would brush cigarettes on his arm, behind his neck and threw a lit cigarette right down on his penis and burned and scarred it. They would not let him sleep (34) and was given only a bite of a sandwich and a swallow of coke and they threw the rest of the coke right in his face (35); they then threw the sandwich into the garbage (36.

Only after many sleepless hours (2 A.M. Sept. 8 to the night of Sept. 9) of questioning did they begin questioning him about the Selma Graff murder and ''. . . They asked me did I know Selma Graff. I said, 'who is she'. They said, 'Well, she was killed'. I said, 'Well I never killed nobody so why are you asking me'. He said, 'Well, I think you did it'. I said, 'I never killed nobody in my life'. He says, 'Shut your God damn mouth' and, you know, I sat there and I shut up. Then he asked me, 'You did it, didn't you?'. I said 'No sir, I didn't'. He hit me on the side of my head and he grabbed me like, toward near the beltline but I didn't have no belt. No pants with no belt; and they ripped it and—'' (32-33).

They ripped his pants right down the front near the fly, grabbed his testicles and squeezed them; he screamed and when he woke up he had water all over him (33).

> ''. . . After he had picked me up off the floor and I was wet and he knocked me out and they sat me down in a chair and that is when he began to explain how she was killed and showed me like

photos, the backyards, the alleys, and all that and he said to me, he says, 'I'm tired of you saying no to me'. He said, 'You know I'm tired, that is all we have been hearing from you is no'. He says 'You're not going to say 'no' no more'. Like that. I was afraid. I was afraid to say any more. So he says, 'You see that window?'. I said 'Yes, sir'. He said, 'I'm going to throw you out of it' and he says, 'Who cares about whether you die or not, you're just another black bastard goon. All I got to say is you tried to escape'. He said 'You understand?' I said 'Yes sir'. He says, 'I want you to repeat what I told you'. He asked me to repeat it. I did the best I could. He had me do it three times. I did the best I could. He said, 'I want you to write' and handed me a paper and told me what to write. I kept on writing. I would still be writing if I was there. I don't deny that. I was afraid of that man. I was afraid of them. They were big men. I was a small man, then'' (36).

''. . . They told me what to write and I wrote it and then he told me he was going to call in some people and I better say just what he told me and I repeated it. I repeated it the whole night. I just kept saying the same thing over and over, the same thing. He asked me 'You did it', and I said 'Yes I did it' '' (36).

After he signed the confession the police officers beat him again ''They just gave me what they called a reminder beating'' (61). ''They said they would kill me if I didn't do what they said. That's exactly the way they put it'' (61).

They took him to the Graff house and then to the school to see Donald Graff, the girl's 10 year old brother and only eye witness to the murder (37, 38).

> ". . . they said he was the only eye witness they had and they asked Donald Graff, they looked at him and said, 'Point at him, is that the man you seen' and Donald said, 'No, sir, no. It was a white man'. So they took him aside, they rushed him off aside and moved me aside and they talked to him for a while, you know, I don't know, five minutes or so, but they talked to him and told him to come back again, 'Point at him, is that the man who killed your sister?'. He said *'No, it was a white man'*. He is black—he is colored. He used the word colored . . ." (Emphasis added) (38).

At the criminal trial, Donald Graff testified that the man who killed his sister was in his (20's) twenties; the plaintiff was (18) eighteen (30, 127a).

He saw the man's head when he was hitting his sister, when he was walking out and when the man hit him (128a). The man hitting Selma was a white man with a little reddish skin, a flushed face (128, 129, 130). He told the detectives that the man was white (129). He also recalled that the man had a blue suit with white stripes in it, a white shirt and a tie (90, 131). The man he saw was a different height than defendant (128). In fact, during the criminal trial, after he testified the man was white, the District Attorney and detectives spoke to Donald Graff, and his brother-in-law when they went home told him to think over his testimony (136-137).

In denying defendant's motion to set aside the jury's verdict in favor of the plaintiff, the trial court decided that:

> "It was revealed to this jury that on the first day of Donald Graff's testimony he repeated his belief that the killer was a white man and contradicted the prosecution's version of the events in other respects. (He later retracted that testimony after 'conversations' with an uncle and, possibly, with police and/or prosecutors.)" (111).

When he was arraigned before the Magistrate the detectives told him when he got in court to ". . . shut my mouth and I did that". "I didn't say nothing". "They asked me but I still didn't say nothing and the court pleaded not guilty for me. I was afraid to say anything". Judge Leibowitz had ordered the court to take pictures of Mr. Williams' body for his defense. The pictures of his body showed the scars and he had a swollen face (41). Judge Leibowitz noticed that his eyes were all black (51), but he "was afraid to tell the Judge anything" (49). The District Attorney also noticed that the left eye was discolored and he walked with a slight limp in his left leg (109).

After a trial Mr. Williams was convicted and sentenced to death and spent two years in death row and 16 years, 6 months, 23 days and about 26 minutes in jail (41).

The Court of Appeals, Second Circuit, ruled that the confession was involuntary and coerced (42-43). Mr. Williams was released in November 1963 and the indictment was dismissed on July 2, 1965.

Defendant's Proof

"The defendant offered no witness who had any direct knowledge of the events leading to Mr. Williams' conviction, nor did it offer any evidence, apart from the

plaintiff's alleged statements to his mother and to Mr. Graff, that it had probable cause to believe Williams guilty. There is no pre-"confession" evidence in this record which would have served as justification for linking Williams to the Graff murder. The arrest of Williams remains unexplained" (111).

Trial Court's Decision

In holding that plaintiff had made out a *prima facie* case and in denying defendant's motion to set aside the jury's verdict, the trial court also stated that:

> "The secondary 'confessions' upon which the City seems to rely as probable cause are ambiguous. In one instance Mr. Williams is alleged to have answered the questions 'Did you tell your mother what you did?' and 'Did you tell your mother that you hit the Graff girl?' by saying 'I didn't mean it. It was intentional.' The Assistant District Attorney assumed that Mr. Williams meant that he had killed the girl unintentionally, but his words —inconsistent on their face—are subject to other interpretations. The alleged statement of Mrs. Graff is similarly ambiguous. In answer to the question 'Why did you kill her?' Mr. Williams is alleged to have said again, 'I didn't mean it.' (The word 'it' could conceivably refer to the confession)."

Similarly, Mr. Walls argued as follows in his summation:

> "What I am here to tell you is that based upon the testimony at trial and it is all in evidence, the testimony of witnesses such as Paula Graff, the

> mother of the murdered girl and statement Mr. Williams made in the presence of his own mother admitting that he committed the crime, that this was sufficient grounds for the City of New York . . .'' Tr. 157.

The record indicates—and the jury may have believed—that these statements were made only after an unexplained arrest, protracted interrogation, physical torture and threats against the life of the accused. In this context it seems to me that the jury might reasonably have concluded that these two brief and ambiguous statements did not give defendant reasonable cause to proceed with the prosecution (113).

On the question of whether or not the presumptions raised by Mr. Williams' indictment and conviction were successfully rebutted, the trial court indicated that:

> ''In *Carney* v. *Schelling*, 234 App. Div. 333, 255 N. Y. S. 118 (1st Dept. 1932), a verdict for plaintiff was overturned because the judge refused to charge that the defendant should prevail unless the jury believed that he testified falsely before the grand jury which returned an indictment against the plaintiff or withheld facts from the grand jury. The defendant here neither claims that improper instructions were given to the jury nor that appropriate instructions were refused.
>
> The rule regarding the presumptions created by subsequent indictment or conviction has been stated as follows:
>
> '. . . a grand jury ought to find an indictment when all the evidence before them is such as in their judgment would if unexplained warrant a convic-

tion by the trial jury. An indictment, therefore, when brought into a civil case, necessarily implies, until the contrary appears, that there was such evidence. A similar provision relates to the duty of the committing magistrate. * * * If from the examination before him, there is sufficient cause to believe the defendant guilty of the crime charged, he must so certify and hold the prisoner. The holding of the accused by a magistrate after an examination into the facts is *prima facie* evidence of probable cause for the prosecution. * * * An indictment by the grand jury is also *prima facie* evidence of probable cause. * * *

The plaintiff in his malicious prosecution case must therefore, meet this *prima facie* evidence of probable cause by showing that the defendant did not make a full and complete statement of the facts either to the magistrate or to the District Attorney; has misrepresented or falsified the evidence, or else has kept back information or facts which might have affected the result. [Citations omitted].' *Hopkinson* v. *Lehigh Valley R. Co., supra,* at 299-300.

Thus, it has been stated that where the defendant's complaint has led to an indictment, the indictment

'in itself constitutes *prima facie* evidence of probable cause which may be overcome only by proof that there was not a full and complete statement of facts to the Grand Jury, or that defendant falsified the evidence or kept back information of facts which might have affected the result. [Citations omitted.]' *Eberhardt* v. *Consolidated Edison Co. of New York,*

1 A. D. 2d 1001, 151 N. Y. S. 2d 823, 824 (1st Dept. 1956).

The *Hopkinson* case suggests that a similar presumption attaches where the defendant's report to the prosecutor leads to an investigation and presentment to a grand jury, and that this presumption is only overcome by a showing that the prosecutor was misled. This rule should, however, have no application if the prosecutor is also found to have been guilty of malice, see *supra*, page 9.

Although plaintiff did not *prove* that the defendant's officers misled the prosecutor, the grand jury or the jury (his counsel did not in fact address the issue), *it may well be that a jury which believed that Williams was prosecuted and convicted on the basis of a confession which was extracted by physical torture might reasonably infer that the prosecutor was misled or implicated, and that the grand jury and trial jury were deceived as to the circumstances of the confession.* (Emphasis added) (113-115)."

In distinguishing the *Caminito* case, cited at length in appellant's brief, the trial court stated that:

"It can be argued that the jury properly found, on the record before it, that Mr. Williams suffered not only a violation of constitutional rights, but also that his conviction was obtained by undue means and without probable cause. *Caminito* dealt with an undisputed record, upon a motion for summary judgment, and did not include allegations of threats against the life of the accused or of physical torture. Although the court found that a conviction obtained

on the basis of a confession which was the result of extended interrogation, during which the defendant was kept incommunicado and was confronted with individuals who pretended to identify him as the perpetrator of the crime in question, was not obtained by undue means, it can be argued that this jury was justified in finding that a conviction obtained on the basis of a confession which was the product of physical torture and threats against the life of the defendant was obtained by 'undue' or 'corrupt' means. There is a great difference between the facts which were stipulated in *Caminito* and the facts which the jury might reasonably have found on this record.

A jury may, but need not, infer malice from a finding of a lack of probable cause to prosecute and, given the brutality of the behavior which Williams ascribed to the police, a jury which believed his story and found no probable cause would clearly be justified in finding malice'' (116).

Motions and Court's Charge

During oral argument trial counsel for the defendant admitted that ''. . . the plaintiff would have to show that the police officers knew the confession was false'' (99).

In refusing to dismiss plaintiff's case at the end of the entire case, the trial court stated that:

''The only evidence we have, but it is evidence, is Mr. Williams' statements. If Mr. Williams' statements are to be believed by the jury, I think it is a question for the jury to decide. It would appear to me what Mr. Williams has said, the way he says

he was treated, what was done to him, it seems to me those measure up to both the standards of reckless disregard of propriety and malice.

I think it is a question of his version of what happened to him, and I'm inclined to think it ought to go to the jury'' (99).

The trial court charged that:

''In order to recover, the plaintiff must prove that at the time the prosecution was initiated defendant's officers did not have probable cause to believe that Mr. Williams was guilty of murder and that they acted maliciously in initiating the prosecution.

Whether probable cause existed depends on whether a reasonably prudent person would have believed defendant—plaintiff—guilty of the crime charged on the basis of the facts which the officers knew, or reasonably believed at the time prosecution was initiated.

The fact that the police officers personally believed plaintiff was guilty is not enough if a reasonably prudent person would not have believed he was guilty.

On the other hand, the fact plaintiff was convicted by a jury is strong evidence that there was probable cause for the police officers to believe that he was guilty.

That evidence can only be overcome by a showing that the conviction was obtained on the basis of fraudulent evidence or by other means. (Emphasis added)

The Court of Appeals for this Circuit has held that Mr. Williams' confession was obtained in a manner which is under present legal standards constitutionally impermissible.

That fact alone, however, is not sufficient to establish that the conviction was obtained fraudulently.

However, the Court of Appeals has also found that the confession was the sole basis of Mr. Williams' conviction and if you find that the confession was elicited in a manner described by Mr. Williams and *if you find that the jury which found Mr. Williams guilty did so because they were led by false or fraudulent testimony—which was given or negotiated by defendant officers*—to believe the confession was obtained in a different manner, *then you may find the conviction was obtained by fraudulent and corrupt means.*

Now, I come to the question of malice. A prosecution is negotiated maliciously if it is negotiated in reckless disregard of rights of the person accused.

If you find that at the time the prosecution was negotiated the defendant's officers did not have probable cause for believing that Mr. Williams was guilty of murder, then you may—but you are not required to—infer from that fact alone they acted maliciously.

If you find that the defendant's officers did not act maliciously your verdict must be for the defendant, even though you find that the officers did not have probable cause to believe that Mr. Williams was guilty.

> If you find that the plaintiff has proved that the police officers acted maliciously and without probable cause your verdict will be for the plaintiff and you will proceed to consider the question of damages'' (101-102).

Trial counsel for the defendant stated that: ''No, I have no exceptions, your Honor'' to the charge including the Judge charging punitive damages.

POINT I

The jury's finding that the plaintiff's conviction was obtained on the basis of fraudulent evidence and by other corrupt means and that, therefore, there was a lack of probable cause and the existence of malice is supported by the record.

In the case of *ABC-Paramount Records Inc.* v. *Topps Record Distributing Co., Inc.*, 374 F. 2d 455 (5th Cir. 1955) at page 460, the Court stated as follows:

> ''The federal system is an independent system for administering justice to litigants who properly invoke its jurisdiction. An essential characteristic of that system is the manner in which, in civil common-law actions, it distributes trial functions between judge and jury and, under the influence—if not the command—of the Seventh Amendment, assigns the decisions of disputed questions of fact to the jury. Jacob v. (City of) New York, 315 U. S. 752 (62 S. Ct. 854, 86 L. Ed. 1166). The policy of uniform enforcement of state-created rights and obligations, see, e.g., Guaranty Trust Co. (of New York) v. York (US), supra, cannot in every case exact compliance with a state rule—not bound up

with rights and obligations—which disrupts the federal system of allocating functions between judge and jury. Herron v. Southern Pacific Co., 283 U. S. 91 (51 S. Ct. 383, 75 L. Ed. 857).

In Byrd v. Blue Ridge Rural Electric Cooperative 1958, 356 U. S. 525, 536-538, 78 S. Ct. 893, 900-901, 2 L. Ed. 2d 953, 962-963, reh. den. 357 U. S. 933, 78 S. Ct. 1366, 2 L. Ed. 2d 1375 (1958), the Supreme Court held that Erie did not prevent the issue of whether Byrd was covered by workmen's compensation, which would be tried to a judge in a state trial, from being tried to a jury in a federal diversity case. The Court continued:

'It cannot be gainsaid that there is a strong federal policy against allowing state rules to disrupt the judge-jury relationship in the federal courts.' "

Similarly, in the case of *Byrd* v. *Blue Ridge Rural Electric Cooperative, supra* it was held that petitioner is entitled in a Federal Court to have the factual issues raised by the defense (in this case lack of probable cause and malice) presented to the Jury, notwithstanding State decisions holding that the statutory defense must be decided by the Judge alone .

In the case of *Sentilles* v. *Inter-Caribbean Shipping Corp.*, 361 U. S. 107 (1959) the Court stated at Page 110:

"Though this case involves a medical issue, it is no exception to the admonition that, 'It is not the function of a court to search the record for conflicting circumstantial evidence in order to take the case away from the jury on a theory that the proof gives equal support to inconsistent and uncertain inferences. The focal point of judicial review is the reasonableness of the particular inference or con-

> clusion drawn by the jury . . . The very essenec of its function is to select from among conflicting inferences and conclusions that which it considers most reasonable . . . Courts are not free to reweigh the evidence and set aside the jury verdict merely because the jury could have drawn different inferences or conclusions or because judges feel that other results are more reasonable.' Tennant v. Peoria & Pekin Union R. Co., 321 U. S. 29, 35. The proofs here justified with reason the conclusion of the jury that the accident caused the petitioner's serious subsequent illness. See Rogers v. Missouri Pacific R. Co., 352 U. S. 500)."

Defendant erroneously argues that the plaintiff herein cannot prevail because the criminal prosecution was purportedly successful (see pp. 19-21 of appellant's brief) and *without the citation of any authority* that the evidence in the within action was insufficient since the plaintiff ". . . should be required to present at least *some* evidence that was *not* part of the record of the trial that resulted in that judgment" (see p. 22 of appellant's brief).

Defendant also erroneously argues that assuming a plaintiff in a malicious prosecution action can litigate on precisely the same evidence that was before the jury in the criminal proceeding where the judgment of conviction was reversed on appeal, the within judgment of conviction was purportedly never reversed (see p. 23 of appellant's brief). This argument, that there was no termination of the proceeding in favor of the accused, is being raised for the first time by the defendant on appeal, and was rejected by the majority in *Caminito* v. *City of New York,* 25 A. D. 2d 848 (2d Dep't 1966) (see concurring opinion).

The Trial Judge's charge, to which there was no exception, assumed said proceedings—as a result of this Court's

decision in *United States* v. *Fay*, 323 F. 2d 65 (2d Cir. 1963)—was terminated in favor of the plaintiff herein.

The defendant ignores in its brief (1) the admissions made by its trial counsel in the Court below; (2) the charge of the Trial Court to which the defendant did not except; and (3) the law relied upon by the jury and Trial Court in establishing the lack of probable cause for the police officers, who coerced a confession from the plaintiff herein, to believe that plaintiff was guilty of the criminal charge.

Although a conviction establishes *prima facie* probable cause for the prosecution, the defendant herein ignores the law which holds that a plaintiff can overcome the judgment of conviction by showing fraud, conspiracy, subornation or other undue means. *Caminito* v. *City of New York*, *supra*; *Simmonds* v. *Sowers*, 253 A. D. 819 (2d Dep't 1938); *Staton* v. *Mason*, 119 A. D. 437 (2d Dep't 1907).

During oral argument counsel for the defendant admitted that "the plaintiff would have to show that the police officers knew the confession was false" and that ". . . they knew the other testimony was false and they proceeded with a motive other than bringing the plaintiff to justice" (99).

The Trial Court charged the jury without exception that the evidence of conviction could be overcome by showing ". . . that the conviction was obtained on the basis of fraudulent evidence or by other means" (101). He further instructed them that:

> ". . . if you find that the jury which found Mr. Williams guilty did so because they were led by false or fraudulent testimony—which was given or

> negotiated by defendant officers—to believe the confession was obtained in a different manner, then you may find the conviction was obtained by fraudulent and corrupt means'' (101-102).

In his opinion the Trial Court, after the citation of authority, stated that:

> ''. . . *it may well be that a jury which believed that Williams was prosecuted and convicted on the basis of a confession which was extracted by physical torture might reasonably infer that the prosecutor was misled or implicated, and that the grand jury and trial jury were deceived as to the circumstances of the confession''*. (Emphasis added) (113-115).

Thus the evidence which was withheld from the jury in the criminal trial was the knowledge by the officers and possibly the prosecutor that Mr. Williams confessed only after the unexplained arrest, protracted interrogation, physical torture and threats against his life.

The evidence which defendant relied upon during the trial of this action to establish probable cause was not the coerced confession but two ambiguous secondary confessions which were purportedly made by the plaintiff herein.

With respect to this argument advanced by trial counsel for the defendant the Court indicated that:

> ''The record indicates—and the jury may have believed—that these statements were made only after an unexplained arrest, protracted interrogation, physical torture and threats against the life of the accused. In this context it seems to me that the jury might reasonably have concluded that these

> two brief and ambiguous statements did not give defendant reasonable cause to proceed with the prosecution'' (113).

The defendant's reliance upon *Caminito* v. *City of New York*, *supra*, was distinguished by the Trial Court who indicated that ''There is a great difference between the facts which was stipulated in Caminito and the facts which the jury might reasonably have found on this record''. He further pointed out that *Caminito* dealt with an undisputed record upon a motion for summary judgment and did not include allegations of threats against the life of the accused or of physical torture.

It is admitted by the defendant that *Caminito* did not include physical brutality and torture and on this basis the Trial Court held that the jury could find that the confession of the plaintiff herein was obtained by ''undue'' or ''corrupt'' means.

Based upon the law, defendant's counsel's admissions and the Judge's charge, the jury returned a verdict in favor of the plaintiff which the Trial Judge refused to set aside.

POINT II

The jury properly found that punitive damages were warranted against the defendant herein.

With respect to punitive damages the Trial Court charged the jury that:

> ''To find a verdict for the plaintiff you must as I previously stated, find that the defendant acted maliciously but that finding does not require that you award the plaintiff punitive damages.

If you find that the degree of defendant's malice or recklessness warrants your doing so, you may award the plaintiff punitive damages but if you further find that the defendant mistakenly, but in good faith, believed probable cause you must take that fact into consideration in exercising your discretion as to the allowance of punitive damages for the amount of such damages if you decide to allow.

There is no exact rule by which to determine the amount of punitive damages. The amount you fix as punitive damages need bear no particular ratio or relationship to the amount you award as compensatory damages.

You may fix such an amount as you find in your sound judgment and discretion based on all the facts before you that you feel will serve to punish the defendant and deter others from the commission of a like offense" (103).

* * *

The defendant did not object or take exception to the Trial Court's charge of punitive damages and in his opinion the Trial Court stated:

> "While punitive damages are only permitted against public bodies in extreme cases, the facts which the jury must have found in order to return a judgment for plaintiff are clearly extreme" (116).

Rule 51 of the Federal Rules of Civil Procedure states in part that:

> "No party may assign as error the giving or the failure to give an instruction unless he objects thereto before the jury retires to consider its verdict,

> stating distinctly the matter to which he objects and the grounds of his objection."

The two cases relied upon by defendant alleging exception to this rule are clearly distinguishable. *Stevenson* v. *Hearst Consol. Publications*, 214 F. 2d 902 (2d Cir. 1954) did not involve the failure of the appellant to object. In fact in *Stevenson* the appellant argued that the Trial Court was in error in denying a specific request to charge. Also in *Ferrara* v. *Sheraton McAlpin Corp.*, 311 F. 2d 294 (2d Cir. 1962) the plaintiff objected to the Judge's charge with respect to constructive notice and the defendant although not joining in the objection, objected to leaving the question of constructive notice to the jury.

Trial counsel for the appellant herein did not object to leaving the question of punitive damages to the jury; he did not object at all.

In discussing punitive damages the defendant argues that the availability of punitive damages is a matter of State law. In citing State law authority, the defendant fails to inform the Court that in *Raplee* v. *City of Corning*, 6 A. D. 2d 230 (4th Dep't 1958) the Court stated that:

> "No exception was taken to the charge as to exemplary damages in the instant case and as a general rule the charge would, therefore, become the law of the case. Antonsen v. Bay Ridge Savings Bank, 292 N. Y. 143, 146, 54 N. E. 2d 338, 339."

The defendant also fails to inform the Court that *Young* v. *Potsdam*, 297 N. Y. 712, 713, 77 N. E. 2d 16 (1947) has been cited as an authority for allowing punitive damages against a municipality.

Additional authority for permitting punitive damages against a municipality is *Macord* v. *City of New Rochelle*,

179 Misc. 311 (Sup. Ct. 1942); *Wallace* v. *New York*, 2 Hilt. 440, 9 Abb. PR 40, 18 How PR 169 (1859).

In permitting treble damages against a municipality, the Court in *Macord* v. *City of New Rochelle, supra,* stated at page 315 that:

> "It seems to me that there can be no question that the trespass was wilful and deliberate. The city plainly believed that it had no right to enter this property by virtue of the original easement. This is shown by its letter to the plaintiffs of September 4, 1937. The attitude of the plaintiffs was plainly expressed by the attorney's letter to the city, dated January 24, 1938. The city, with its full knowledge of the situation, elected to take a chance and to go ahead, and it must suffer the consequences. New York Institute for Education of the Blind v. Colonial Sand & Stone Co., Inc., 264 App. Div. 339, 35 N. Y. S. 2d 368."

Baynes v. *City of New York,* 23 A. D. 2d 756 (2d Dep't 1965) cited by defendant does not stand for the proposition that punitive damages does not lie against the municipality. That Court, as admitted by the defendant, merely stated that:

> "We find no proof in the record to justify an assessment for punitive damages against the defendant City of New York".

The Trial Court herein after instructing the jury, without exception by the defendant, found that the jury was proper in finding such proof in the record.

The defendant also misleads the Court in citing *Costich* v. *City of Rochester,* 68 A. D. 623 (4th Dep't 1902) for

the proposition that punitive damages cannot be obtained against a municipality. In quoting from the case, the defendant fails to quote from page 837 of said decision wherein the Court states that:

> "It is not necessary for us to, and we do not, hold that a municipal corporation could never, under any circumstances, become responsible for punitive damages, in an action of trespass or otherwise. But we are prepared to say that the circumstances which would make it liable for such damages must be very extraordinary, and almost impossible to conceive of".

Although in 1902 such conduct by a municipality might be impossible to conceive, the actions by the defendant herein were found by the jury and the Trial Court to warrant punitive damages.

Concerning the public policy with respect to punitive damages against municipalities, the Court in *Wallace* v. *New York, supra,* as early as 1859, stated at page 41 that:

> 'The recovery of punitory or vindictive damages is allowed only where the act causing the injury has been wilfully done; where the circumstances show that there was a deliberate, preconceived, or positive intention to injure, or that reckless disregard of the safety of persons or property which is equally culpable".

In the case at bar, there was such a finding of deliberate, wilfull and preconceived intention to injure the plaintiff herein.

Rule 51 of the Federal Rules of Civil Procedure also provides in part that:

> ". . . any party may file written requests that the Court instruct the jury as set forth in the requests".

The defendant herein for the first time on appeal argues that there was no showing of authorization, ratification or participation by the defendant City.

As previously indicated, no party may assign as error the failure to give instruction unless he objects thereto before the jury retires to consider its verdict. This the defendant failed to do.

CONCLUSION

The jury's verdict and the Trial Court's refusal to set aside that verdict and the resulting judgment should be affirmed.

Respectfully submitted,

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